Date: June 10, 1997

Case No: 89-OFC-1

In the Matter of

U.S. DEPARTMENT OF LABOR
Plaintiff

v.

JACKSONVILLE SHIPYARDS, INC.
Defendant

RECOMMENDED DECISION AND ORDER ON REMAND[1]

This case has a protracted history. It has been pending before the Department of Labor since the Plaintiff, the Office of Federal Contract Compliance Programs (OFCCP), filed a complaint on September 30, 1988 against the Defendant, Jacksonville Shipyards, Inc. (JSI). This complaint alleged that JSI discriminated against women and minorities in violation of Executive Order No. 11,246, 3 C.F.R. 338 (1964-1965), *reprinted as amended* 42 U.S.C. § 2000e note (1994). A hearing was held on March 18-22, April 1-12, and June 3-4, 1991, in Jacksonville, Florida. At the outset of the hearing, the parties settled the issue of discrimination against minorities, and the partial settlement decree, which I approved on April 15, 1991, is part of the record of this case.

OFCCP alleged at the hearing that JSI discriminated against women in hiring for the entry level job of helper second class (or helper 2/c). JSI denied this allegation. Due to the size of the record, the parties were given until September 30, 1991 to file proposed findings of fact and conclusions of law. On July 7, 1992 I issued a *Recommended Decision and Order* recommending that the complaint be dismissed. On May 9, 1995 the Secretary of Labor issued a *Decision and Remand Order* (*Secretary's Decision*) which found that JSI "failed to treat all applicants equally and that OFCCP has proved JSI engaged in a pattern and practice of discrimination against women in hiring for Helper 2/c jobs in 1985." (*Secretary's Decision* at 19-20). The Secretary remanded the case to me so that the proper remedies could be determined in light of his decision.[2]

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[1]Citations to the record of this proceeding are as follows: PX--Plaintiff's Exhibit; DX--Defendant's Exhibit; TR--Hearing Transcript. On January 31, 1997, OFCCP filed updated back pay and interest calculations for the individual class members. Without objection, this exhibit is admitted into evidence as PX 172.

[2]To support his finding that JSI discriminated against women in filling helper 2/c positions in 1985, the Secretary cited JSI's answers to OFCCP's requests for admission. *See Secretary's Decision* at 11-12. To the best of my knowledge, JSI's responses to OFCCP's requests for

In the intervening time between the *Secretary's Decision* and the issuance of this decision, JSI closed its shipyard and subsequently filed for bankruptcy. (Revised Notice of Suggestion of Pendency of Chapter 11 Case at 1.) An effort was made to resolve whether a remedies determination could proceed in light of the bankruptcy; both parties participated in a conference call on December 6, 1996. As discussed below, I have concluded that the remedies determination can proceed and am therefore issuing this decision.

I. Back Pay

A. Approach to Determining Back Pay

1. Classwide Approach

The issue of back pay in this case, as in most cases, is complicated and highly contested between the parties. Awards of back pay may be made on an individual-by-individual basis or on a classwide basis. It must also be decided whether each class member will be awarded full back pay (make-whole relief) or whether a shortfall/pro rata approach is more appropriate. After reviewing the record and the parties' arguments, it has been determined that the most equitable method of fashioning a back pay award in this case is to use a classwide/shortfall approach, where the female job applicants who were discriminated against share an aggregate amount of back pay divided in a pro rata fashion. The shortfall/pro rata approach to calculating damages is particularly appropriate in this case where it is nearly impossible to determine with any accuracy which female applicants would have been hired by JSI absent the discriminatory hiring practices found by the Secretary.

While individualized hearings and, therefore, individualized determinations on back pay are generally the favored method of calculating a back pay award, this "should not be read as an unyielding limit on a court's equitable power to fashion effective relief for proven discrimination." *Segar v. Smith*, 748 F.2d 1249, 1289 (D.C. Cir. 1984). In the case at hand the substantive equivalent of individualized hearings has already occurred, with individual women testifying at the hearing as to their likelihood of accepting a helper 2/c job if one was offered to them, the pay that they may have received at other jobs during the period in question, and other factors important to the computation of back pay. However, under the facts of this case, determining which women would have obtained jobs absent discrimination is highly speculative and would lead to "a quagmire of hypothetical judgments." *See Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974). Thus, where the employer's hiring requirements and the employees' job qualifications are ambiguous, and where the facts of the case do not lead to a clear indication regarding which individuals would have been hired absent discrimination, "a class-wide approach to the measure of backpay is necessitated." *Pettway*, 494 F.2d at 261.

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admission were neither offered nor admitted into evidence.

OFCCP proposes an individual-by-individual approach to back pay in this case (Plaintiff's Proposed Findings of Fact and Conclusions of Law (Plaintiff's Findings) at 148-49), and further advocates that each class member is entitled to make-whole relief unless the employer can prove that the applicant was denied employment for a legitimate non-discriminatory reason. (*Id*. at 147; *see also International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362 (1977). OFCCP further argues that the issues in this case are not so complex as to preclude an individual-by-individual approach to back pay. But OFCCP does not address the highly speculative approach that an individual-by-individual inquiry would require. Moreover, it should be noted that the back pay award "should not constitute a windfall at the expense of the employer." *Ingram v. Madison Square Garden Center, Inc.,* 709 F.2d 807, 812 (2d. Cir 1983).

OFCCP argues that the shortfall/pro rata approach is not appropriate in this case because, in part, the overall number of job vacancies was more than twice the number of female applicants (Plaintiff's Findings at 147). While it is correct that 69 women applied for 191 positions, making it theoretically possible that all of the women applicants could have been hired, it is highly improbable. OFCCP's own expert, Dr. Hoffman, testified that in addition to the 69 women (6.08% of the applicant pool), 1065 men (93.92% of the applicant pool) applied for the 191 helper 2/c positions (TR at 2322). Because there is no evidence which suggests that female applicants were *more* qualified than their male counterparts, arguing that 100%, or all 69 women, would have been hired defies both statistical probability and common sense.

A much more likely outcome is that, absent discrimination, females would have been hired in the same proportion as the total proportion of female applicants, *i.e.*, since 6.08% of the applicants were female, 6.08% of the total hires should have been female. This statistical approach to determining the percentage of females likely to be hired was offered by OFCCP's own expert, Dr. Hoffman (TR at 2326-27). In light of the fact that it is possible to estimate with some degree of accuracy the *percentage* of the overall hires who, absent discrimination, would have been women, while also recognizing that it is virtually impossible to determine which of the *69 individual* women applicants would have been hired, the class-wide approach is the most equitable. This classwide approach to calculating back pay awards has been accepted and utilized by many courts. *See, e.g. Dougherty v. Barry,* 869 F.2d 605 (D.C. Cir. 1989); *Pitre v. Western Elec. Co.,* 843 F.2d 1262 (10th Cir. 1988); *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1986); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984); *Ingram v. Madison Square Garden Center, Inc.,* 709 F.2d 807 (2d Cir. 1983); *Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers,* 637 F.2d 506 (8th Cir. 1980); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Thomas v. Christopher,* 169 F.R.D. 224 (D.D.C. 1996) (approving settlement based in part on classwide approach); *EEOC v. Spring and Wire Forms Specialty Co.*, 790 F. Supp. 776, 780 (N.D. Ill. 1992).

2. Determination of the amount and distribution of the total classwide award

Several approaches for determining and distributing a classwide award have been used by the courts, most based on the premises set forth in *Hameed v. International Ass'n of Bridge,*

Structural and Ornamental Iron Workers, 637 F.2d 506 (8th Cir. 1980), a racial discrimination case. In *Hameed*, the court based the back pay award on a classwide, "shortfall" approach. "Shortfall" in *Hameed* referred to the number of additional protected class members (in this case black applicants) the employer would have been expected to hire absent discrimination. The shortfall estimation in *Hameed* was computed by subtracting the *expected* number of successful black applicants (67)[3] from the *actual* number of successful black applicants (22), amounting to a shortfall of 45 persons. *Id*.

The court then determined that the back pay for the entire class of black applicants should be calculated by computing as accurately as possible the lost earnings of the 45 shortfall applicants and dividing these lost earnings among the entire class of black applicants. To compute the class's lost earnings based on the facts in *Hameed*, the court proposed averaging, on a year-by-year basis, the aggregate earnings of randomly selected successful white applicants and subtracting from this sum the aggregate earnings of an equal number of randomly selected black applicants who were rejected for the program for discriminatory reasons. *Id.* at 520-21. However, the Eighth Circuit, not wanting to tie the district court's hands, gave the district court the latitude to distribute the back pay award in a more equitable matter if it could. *Id*. at 521.

Other courts have also used forms of the shortfall/pro rata approach in calculating the amount of the back pay award and the method of its distribution. As in *Hameed*, this approach requires an estimate of the total number of individuals in the protected group that would have been hired absent discrimination. This number is generally based on a statistical assumption accepted by the courts and, in this case, OFCCP's expert, that the percentage of women (or minority individuals in a racial discrimination case) hired should roughly equal the percentage of women who applied for the position (TR at 2326-27). *See also Thomas v. City of Evanston*, 610 F. Supp. 422, 435-36 (N.D. Ill. 1985). *Catlett v. Missouri State Highway Comm'n*, 627 F. Supp. 1015, 1018-19 (W.D. Mo. 1985); *Patterson v. Youngstown Sheet and Tube Co.*, 475 F. Supp. 344 (N.D. Ind. 1979). Then the shortfall number is calculated by subtracting the number of actual female hires from the number of expected female hires. The back pay award can then be calculated based on the shortfall number through one of two methods. In the first method the shortfall number is multiplied by the salary or wages the position applied for was worth. S*ee Catlett v. Missouri State Highway Comm'n*, 627 F. Supp. 1015 (N.D. Ill. 1985). In the second method the total of the wages earned by actual hirees is multiplied by the percentage of female applicants who should have been successful absent discrimination; subtracted from this total is any amount that any actual female hirees did earn. *See Thomas v. City of Evanston*, 610 F. Supp. 422 (N.D. Ill. 1985). Either method should produce the same results.

The back pay award can also be computed on the basis of the shortfall percentage, rather than the shortfall number. The shortfall percentage is the difference between the percentage of the protected class that would be expected to be hired absent discrimination minus the percentage

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[3]The expected number of successful black applicants was based on the percentage of blacks in the applicant pool.

of hirees in the protected class that were actually hired. The back pay determination based on shortfall percentage is calculated by taking the amount of total earnings by all hirees during the applicable time period and multiplying that number by the shortfall percentage. See *EEOC v. Spring and Wire Forms Specialty Co.*, 790 F. Supp. 776, at 780 (N.D. Ill. 1992). Under any of these approaches, the back pay amount is then distributed equally among the class members. *See Catlett*, 627 F. Supp. at 1019, *Thomas*, 610 F. Supp. at 437.

3. Calculation of back pay in this case

In this case, back pay will be determined in accordance with the methods described in the above cases, with particular reliance on the approaches used in *Hameed* and *Spring and Wires Forms Specialty Co.* As discussed earlier, Dr. Hoffman determined that of 1134 total applicants for the helper 2/c position, 69, or 6.08%, were female (TR at 2326-8). Using this statistic, both OFCCP's expert and the Secretary found that JSI should have hired approximately 12 women from the applicant pool (TR at 2326-28; *Secretary's Decision* at 10 n.8).[4] Of the total number of helpers 2/c hired three were women.[5] Therefore, JSI's 1985 female hiring "shortfall" number is nine women.

The shortfall percentage can also be computed from these statistics. The three women hirees constituted only 1.57% of the total hirees, whereas absent discrimination it can be statistically presumed that 6.08% of the hirees would have been women. Therefore, the shortfall percentage is 4.51%.

Next, the amount of the class award needs to be determined. Both JSI's expert and OFCCP's expert agreed that the total amount of earnings of all 1985 hirees from the 1985 to 1990 period approximated $1.1 million dollars (*see* revised DX 272 at 5; TR at 3013). Dr. Haworth's revised Table HD-2 calculated the exact amount of wages paid out to 1985 hirees during the 1985 to 1990 period to be $1,181,950 *(see* revised DX 272, at 5). The total back pay award to be divided among the class members can be derived by multiplying the total value of the earnings by the actual 191 hirees, or $1,181,950, by the shortfall percentage, 4.51%,[6] which

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[4]Actually, according to Dr. Hoffman's testimony, 11.6 women should have been hired absent discrimination. The Secretary rounded this number to 12 women.

[5]Although the Secretary stated "[o]f the total number hired as Helpers 2/c, 191, 2 were women and 189 were men" (*Secretary's Decision* at 10), the Secretary later stated:

> I agree with the ALJ that one woman, Kelly Rensdell [*sic*], who applied late in 1985 and was hired in 1986 . . . should be counted as a hire for purposes of this case." (*Id.* at 12 n.11.)

[6] This method is same used in *EEOC v. Spring and Wire Forms Specialty Co.*, 790 F. Supp. 776, at 780 (N.D. Ill. 1992).

equals $53,305.95. This sum shall be subject to simple pre-judgment interest. The interest rate is to be the IRS adjusted prime rate. *See* 29 C.F.R. §20.58.

B. Determination of Class Members and Distribution of the Classwide Back Pay Award

1. Determination of Class Members

When a classwide approach to calculating back pay has been chosen "the determination of which employees are entitled to be included in the class receiving back pay becomes crucial." *Stewart v. General Motors Corp.*, 542 F.2d 445, 453 (7th Cir. 1976). This can require some individual inquiry into employment history. *See Pettway*, 494 F.2d at 261-62, n.151. However, in this case that individual inquiry will be sharply limited. The Secretary found in his decision that JSI discriminated against helper 2/c applicants on the basis of sex (*Secretary's Decision* at 19-20). The Secretary also found that there was no evidence that JSI required or preferred candidates with prior experience when JSI hired applicants for helper 2/c positions.[7] (*Id.* at 13-15). Thus, it must be presumed that all female helper 2/c applicants are potential victims of discrimination.

While the baseline assumption for this case is that all female helper 2/c applicants are potential victims of discrimination, there are still valid reasons to exclude certain of the female applicants from the class. Excluded from the class will be female applicants who would not have accepted a job at JSI had one been offered, and those that did not meet JSI's non-discriminatory minimum requirements for a helper 2/c position, *i.e.*, applicants who were not available to work all three shifts. Also excluded are those women whose earnings were significantly higher than the wages paid to helper 2/c's during the period in question; these women clearly were not economically damaged by JSI's discrimination and are not entitled to back pay.

The following twelve women are excluded from the class:

1. Jennifer Cook. Ms. Cook is excluded from the class based upon her testimony that she was afraid of heights and would not work on scaffolding at a height higher than six feet. (TR at 776-77.) Therefore she could not perform the tasks required of a helper 2/c.

2. Darlene (Ricks) Hodges. Ms. Hodges was excluded from the class because of her lack of cooperation during the proceedings, including her failure to respond to a subpoena requesting documents concerning her wages during the time period in question. These documents would

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[7] As stated in the *Secretary's Decision* "there are a number of examples of JSI hiring men without prior relevant experience, but passing over women who applied at the same time who had such experience." (*Secretary's Decision* at 13). The Secretary also included a chart in his decision which illustrated where women were not hired who had relevant experience while men were hired who had no relevant experience. (*See id.* at 14.) From these facts the Secretary concluded "JSI's preference was not to hire people with relevant work experience, it was to hire men." (*Id.* at 15.)

have provided information as to whether Ms. Hodges experienced any economic damage during the time period in question. Her related testimony was not credible. Her failure to comply with the subpoena or testify credibly prevented any determination of economic damage, thus she is excluded from the class.

3. Janice Fletcher. Ms. Fletcher is excluded from the class because her earnings during the time period in question were significantly higher than the wages paid to a helper 2/c. (*See* revised DX 276; PX 105.)

4. Marie (Carter) Jones. Ms. Jones is excluded from the class based upon her testimony that she was told by various doctors not to lift objects heavier than 12-20 pounds and not to raise her arms above her head (TR at 1091-92). Therefore, she could not perform the tasks required of a helper 2/c.

5. Sharon Lewis. Ms. Lewis is excluded from the class based upon her testimony that she would not have accepted the position at JSI if it required her to climb a 10-foot ladder (TR at 1649, 1658). Therefore, she could not perform the tasks required of a helper 2/c. She also is excluded because her earnings during the time period in question were significantly higher than the wages paid to a helper 2/c. (*See* revised DX 276; PX 105.)

6. Darlene Lockett. Ms. Lockett is excluded from the class because her earnings during the time period in question were significantly higher than the wages paid to a helper 2/c. (*See* revised DX 276; PX 105.)

7. Iris Mack. Ms. Mack is excluded from the class based on her deposition testimony that she was planning on taking time off (which she did) in the months immediately following her application to care for her ill mother. (PX 168(a) at 33-34.) She would have been unavailable for the job had it been offered to her and should therefore be excluded from the class.

8. Susie Mae Mercy. Ms. Mercy is excluded from the class based on her testimony that she was not healthy enough to work when she applied for the job because of a medical condition (TR at 3152-53). Therefore, she could not perform the tasks required of a helper 2/c.

9. Andrea (Mills) Jones. Ms. Jones is excluded from the class based on the evidence that she passed her physical, but then decided that she was no longer interested in the job (TR at 438).

10. Sheryl (Foster) Mills. Ms. Mills is excluded from the class based on the her testimony that jobs in several of the departments where helper 2/c's worked were too heavy for her to undertake (TR at 612-14). Therefore, she could not perform the tasks required of a helper 2/c.

11. Sharon Renee Norris. Ms. Norris is excluded from the class based upon her testimony that she would not have worked the 3:00 PM to 11:00 PM shift (TR at 3175-78). Therefore, she could not meet pre-condition required of hires for the helper 2/c position.

12. Mary Smith. Ms. Smith is excluded from the class because her earnings during the time period in question were significantly higher than the wages paid to a helper 2/c. (*See* revised DX 276; PX 105.)

The following women are included in the class of female applicants who were discriminated against by JSI and should share in the classwide award:

1. Linda Batten
2. Barbara (Miles) Began
3. Betty J. Bentley
4. Katurah Blue
5. Sonya Brackett
6. Cheryl Diane Branch
7. Rowena (Brown) O'Neal
8. Janice Butler
9. Teresa (Woods) Crosby
10. Serena (Dunn) Dotson
11. Wilma Jean Dunn
12. Velma (Jackson) Ellison
13. Vickie (Mills) Gerhart
14. Pamela Goodwin
15. Paula Hill
16. Willie Mae Hines
17. Janna Mary Howell
18. Kay Johnson
19. Sandra Jones
20. Tina Marie Love
21. Betty Jean Manning
22. Brenda Martin
23. Nan (Brink) Murphy
24. Melanie Murray
25. Margaret Musselman
26. Theresa (Diotte) Potter
27. Carla Steward Purdy
28. Karen (Williams) Rodriguez
29. Mary (Houston) Rouse
30. Carrie Scott
31. Bobbie Jean Simpo
32. Lovely Taft
33. Diane Thompson
34. Downetta Trotter
35. Pamela (Lewis) Weathington

36. Linda (Ducharme) Wendling
37. Mary Catherine West
38. Joyce Anita Williams
39. Mary Alice Williams
40. Norma Jean Williams

2. Pro rata share

As discussed above, it is virtually impossible to tell with any certainty which of the above 40 women would have been hired by JSI absent discrimination. Therefore, the most appropriate means of distributing the back pay award is on an equal, pro rata basis. Accordingly, the back pay award of $53,305.95 plus pre-judgment interest shall be divided equally among the 40 eligible class members.

II. Bankruptcy

I find that the automatic stay provision of the Bankruptcy Code does not affect this proceeding because of the exceptions contained in 11 U.S.C. Section 362(b), which states in part:

> (b) The filing of a petition under section 301, 302, or 303 of this title, . . . does not operate as a stay --
>
> > (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
> >
> > (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.[8]

This proceeding falls under the Department of Labor's regulatory authority, and therefore is excepted from the automatic stay. Other courts have held that similar Department of Labor proceedings were excepted from the automatic stay provisions of the Bankruptcy Code. *See Eddleman v. U.S. Dep't of Labor,* 923 F.2d 782 (10th Cir. 1991);. *In Re: James H. Crockett, Debtor,* 204 B.R. 705 (Bank. W.D. Tex. 1997); *Martin v. Safety Electric Construction Co.*, 151 B.R. 637 (Bank. D. Conn. 1993); *Dole v. Hansbrough,* 113 B.R. 96, (Bank. D.D.C. 1993). Of course, collection of the back pay award must proceed according to normal bankruptcy procedures. *Martin*, 151 B.R. 637, at 638.

III. Debarment

[8] 11 U.S.C. 362 (b) (4) & (5).

OFCCP requested in its brief that JSI be debarred if it fails to comply with the final order in this case within 60 days. In light of the fact that JSI is in bankruptcy, which takes its ability to comply with my Order out of its hands and places it in the hands of the bankruptcy court, I find that debarment is not appropriate in this case. An additional fact that renders the debarment issue moot is that JSI has ceased its operations (*see* Plaintiff's Response to ALJ Inquiry Concerning Feasibility of Back Pay Order at 1).

RECOMMENDED ORDER

It is recommended that JSI be found liable for back pay in the amount of $53,305.95, which shall be subject to simple pre-judgment interest pursuant to 29 C.F.R. 20.58, to be equally divided among the 40 women listed above who belong to the class of women applicants whom the Secretary found were discriminated against in the hiring of helper 2/c positions.

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JEFFREY TURECK
Administrative Law Judge